

No. 83-1022

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1983

FRED EARULLO AND LOUIS KLISZ,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, SECOND DIVISION**

**BRIEF FOR RESPONDENT IN OPPOSITION TO THE
GRANTING OF THE WRIT OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review the Illinois Appellate Court's determinations that the facts show that Petitioners were found guilty beyond a reasonable doubt.

2. Whether this Court should review the Illinois Appellate Court's determination that the Petitioner Klisz was properly cross-examined on matters developed during his direct testimony which explained, modified, and discredited his direct testimony.

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OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, Fifth Division in this case was entered on March 25, 1983. The Illinois Supreme Court denied leave to appeal on October 4, 1983. The opinion of the Appellate Court of Illinois is reported at 113 Ill. App. 3d 774, 447 N.E. 2d 925.

JURISDICTION OF THE COURT

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1275(3). However, as stated below, petitioner has not set forth sufficient reasons for this Court to grant certiorari in this case.

STATEMENT OF THE CASE

Defendants were found guilty at a bench trial of involuntary manslaughter and official misconduct.

At trial it was established that on the afternoon of July 6, 1980 at 4:40 p.m. petitioners, both Chicago Police Officers, arrested and handcuffed Mr. Richard Ramey for smoking a cigarette on a train. (T.R. 280, 1585)

It was further established that eight eye-witnesses watched the petitioners repeatedly beat, kick and punch the fifty-one year old victim. (T.R. 278, 325, 327, 330-335, 397, 466, 660, 663, 684, 940, 1009) Mr. Ramey was so badly beaten by the petitioners that he was taken to the hospital at 6:00 p.m. (T.R. 1342) Mr. Ramey died after suffering two cardiac arrests. (T.R. 882)

The Cook County Medical Examiner testified that as a result of the beating administered by the petitioners, Mr. Ramey had suffered two broken legs, nine broken ribs, a fractured spinous process and a broken bone in his neck. (T.R. 1035-1081)

Both petitioners denied ever hitting or kicking Mr. Ramey. (T.R. 1472, 1593)

Petitioner Klisz testified on direct examination that he gave an informal statement prior to arrest which did not accurately include what petitioner Klisz had said because he was never given the opportunity to read, sign,

or correct the statement. (T.R. 1617, 1612) On cross-examination petitioner Klisz was asked if it was true that prior to his arrest he had been given the opportunity to read, review and sign his statement and that he had refused the opportunity. (T.R. 1644) Petitioner Klisz responded that he was given the opportunity to read, review and sign his statement but that he had so refused. (T.R. 1645)

Both petitioners were convicted of involuntary manslaughter and official misconduct in the death of Richard Ramey. Petitioner Klisz was sentenced to the Illinois State Penitentiary for a period of eight years. Petitioner Earullo was sentenced to the Illinois State Penitentiary for a term of two years. The Illinois Appellate Court reduced petitioner Klisz's sentence to a term of five years.

Petitioners urge that this Court grant this petition in order to review factual determinations of the trial court. Respondent submits that the writ should be denied because this court should not grant certiorari in order to review the factual findings of a state trial court.

REASONS FOR DENYING THE WRIT

I

THE TRIAL COURT PROPERLY CONSIDERED ALL THE EVIDENCE AND FOUND PETITIONERS GUILTY BEYOND A REASONABLE DOUBT OF INVOLUNTARY MANSLAUGHTER AND OFFICIAL MISCONDUCT.

Petitioners contend that since Mr. Ramey died four hours after he left their custody and control they did not cause his death. Petitioners attempt to support their contention by excerpting a paragraph from the trial court's denial of their untimely motion to exhume the decedent's body, and by relying, again out of context, on the medical examiner's estimate of the time injuries were inflicted. (T.R. 1139)

Respondent respectfully submits that even a cursory review of the proceedings reveals that "the acts of both defendants in the C.T.A. station were likely to cause great bodily harm and that they were performed in conscious disregard of a substantial restraint." 113 Ill. App.3d at 788.

The Cook County Medical Examiner estimated that petitioners beat the victim, Mr. Ramey, two or more hours before the latter's death. (T.R. 1135-1137). The mere fact that an interval of time transpired between the beating and the death did not preclude a finding that the beating was the cause of death. *People v. Riley*, 31 Ill. 2d 490, 202 N.E.2d 531 (1964).

Petitioners also seek to convince this court that the convictions should be reversed, as they attempted and

failed to do in the trial and Illinois Appellate Court, by arguing that the trial court misunderstood the weight and credibility of the victim's X-rays. Their argument remains meritless. As the Illinois Appellate Court noted regarding the excerpted statement of the trial judge,

We note, however, that this quoted statement was made at the time it denied defendant's post-trial motion to exhume decedent's body. The court, in finding the motion to be untimely also stated that it was satisfied that the testimony of Dr. Stein sufficiently established that decedent's death was caused by the injuries received.

Moreover, our examination of the record reveals no basis for defendants' conclusion that the trial court did not consider the testimony concerning the X-rays. (113 Ill. App.3d at 791)

The Appellate Court also stated that even if the X-rays were not considered there was no prejudice to defendants since most of them were not diagnostic, the X-rays showed the same fractures found by Dr. Stein, and Dr. Hallenbeck testified that an autopsy was a much more accurate way of determining whether a bone was broken. 113 Ill. App.3d at 791.

Petitioners seek to ignore the trial court's finding and the Appellate Court's opinion that "the considerable testimony . . . of decedent having been kicked, hit and stomped upon by defendants before he left their custody" leaves but one conclusion that . . . "there is nothing in the record to indicate that injury was inflicted upon decedent by any other person or that he had injured himself." 113 Ill. App.3d at 787.

The trial court did not commit any error in evaluating the evidence. A presumption exists that the trial judge,

when sitting as a trier of fact, considers all admissible evidence. *People v. Barnes*, 48 Ill. App.3d 226, 363 N.E.2d 50 (1st Dist. 1977) A decision by a state court that the evidence is sufficient to support a cause of action will not be reviewed by this Court. *American Radio Association v. Mobile Steamship Association*, 419 U.S. 215, 231 (1974). As petitioners are merely seeking a review of the sufficiency of the evidence, respondent respectfully requests that certiorari be denied.

II

THE TRIAL COURT PROPERLY PERMITTED THE STATE TO CROSS EXAMINE PETITIONER KLISZ ON MATTERS DEVELOPED DURING HIS DIRECT EXAMINATION AND NO FIFTH AMENDMENT RIGHTS WERE VIOLATED.

Petitioner Klisz contends, by ignoring his direct testimony, that his fundamental right to remain silent was violated when he was asked on cross-examination if he had refused to make a court reported statement.

In the present case, the following colloquy occurred during the direct examination of Klisz by the defense:

- Q. And do you recall giving a statement?
- A. Well, they called it an informal statement, sir. To explain what happened.
- Q. Do you remember who you talked to?
- A. I only remember two people in the room, sir. That was State's Attorney Quirk and Investigator Bruce from OPS [Office of Professional Standards].
- Q. Now, did you give a statement?
- A. I gave a summation of what happened, yes, sir.
- Q. All right. Now, did you ever read that statement?
- A. Yes, sir, sometime later.

- Q. Did you read it on the night of the 14th.
A. No, sir.
Q. Did you read it at a later date?
A. Yes, sir.
Q. And after reading it, did — Strike that. Before you read it or after you read it, did you — did any police personnel ask you whether it was true and accurate?
A. No, sir.
Q. Did they ever ask you to make any corrections or deletions?
A. No, sir.
Q. You never signed a statement, as such, in this case, did you?
A. No, sir.
(T.R. 1611, 1612)

On cross-examination, the following occurred:

- Q. Is it your testimony that you were never given an opportunity to make a court reporter statement by Joseph Quirk, Assistant State's Attorney in connection with this case?
A. No, sir.
Q. You were given the opportunity?
A. Yes, sir.
Q. And you refused?
A. No, sir.
(T.R. 1644, 1645)

The questions asked on direct examination were such that the prosecutor reasonably believed that Petitioner Klisz was inferring that the statement was inaccurate because he was not given the opportunity to read, sign, or review the statement. Therefore, the inquiry on cross-examination regarding Petitioner's opportunity and refusal to make a court reported statement concerned a

matter raised on direct examination and was entirely proper.

The Illinois Appellate Court was not misled by Petitioner's omission of his direct examination. That Court stated:

"The reliance of Klisz on *Doyle v. Ohio*, (1970) 426 U.S. 610, 96 S. Ct. 2240, 49 L.Ed. 2d 91, is misplaced. In *Doyle*, it was held that the State may not constitutionally use a defendant's silence at the time of arrest, after receiving Miranda warning, for impeachment purposes. Here, the cross-examination concerned the refusal of Klisz to make a court reporter statement prior to his arrest, which is not a violation of his fifth amendment rights. *People v. Hart*, (1980), 92 Ill. App.3d 272, 47 Ill. Dec. 823, 415 N.E.2d 1136. (113 Ill. App.3d at 790).

Thus the ruling in *Doyle* concerning post-arrest silence has nothing to do with this case. *Doyle v. Ohio*, 426 U.S. 610 (1970). In the first place, petitioner Klisz was not under arrest at the time he gave an oral statement, but refused to repeat it to a court reporter. Secondly, petitioner Klisz did not remain silent, but in fact gave a statement. Thirdly, and most important, it was the defense at trial which opened up the question of whether petitioner Klisz had signed a written statement. Having opened up the question at trial, petitioner Klisz has no standing to object to the fact that the prosecution cross-examined on the matter. *United States v. Nobles*, 422 U.S. 225, 240 (1975).

As it was petitioner Klisz who first presented evidence to the trial court concerning his failure to give or sign any written statement, this issue provides no basis for a grant of certiorari.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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